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UNCLAS SECTION 01 OF 02 BRASILIA 002774

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DEPT FOR WHA/BSC

E.O. 12958: N/A

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SUBJECT: BRAZILIAN HIGH COURT STRIKES DOWN EXCEPTION TO ABORTION BAN

REF: BRASILIA 1670

1. SUMMARY. On October 20, after a stormy debate, Brazil's Supreme Federal Tribunal struck down a temporary injunction issued in July that created a narrow exception (only the third) in Brazil's abortion ban. The exception would allow abortions in cases of anencephaly (where the fetus has no brain). Threat to the life of the mother and pregnancy resulting from rape are the two existing exceptions. Anencephaly is linked to maternal nutritional deficiencies and has a 100% mortality rate within minutes of birth. Last July, when a judge issued the injunction it sparked a heated public debate from medical, legal, religious, and human rights officials. The case is not over: this ruling only strikes down the injunction on technical grounds but does not decide the underlying case. The high court must now decide whether it will hear arguments on the merits or leave the issue to legislators --who have shown little interest in being drawn into the debate. END SUMMARY.

#### HIGH COURT STRIKES DOWN INJUNCTION

2. On 1 July 2004, a judge on Brazil's Supreme Federal Tribunal (STF), Marco Aurelio Mello, issued a temporary injunction that allowed anencephaly cases (where the fetus has no brain) to become only the third exception to Brazil's ban on abortion (reftel). Threat to the life of the mother and pregnancy resulting from rape are the two existing exceptions. That injunction remained in force until October 20 when, after tempestuous debate, the full Court struck it down by a 7-4 vote. Mello and Judge Joaquim Barbosa nearly came to blows during the arguments. The case is not over: the full court decision struck down the injunction on technical grounds but did not decide the merits of the underlying case.

3. Anencephaly is linked to maternal nutritional deficiencies and has a 100% mortality rate within minutes of birth. Thus, when Judge Mello issued the injunction in July, he kicked off a broad public debate over abortion rights with jurists, health providers, women's rights activists, and religious leaders lined up on both sides of the issue. After the ruling, one attorney who argued in support of the injunction noted that the Catholic Church "inundated the judges' computers with e-mails". On November 7, speaking in Rome to a group of Brazilian pilgrims, the Pope said, "I hope that in every moment (Brazilian) officials continue defending life from conception until its natural end". According to a World Health Organization study Brazil has the world's fourth highest anencephaly rate (8.6 per 10,000 births). In a survey conducted in Sao Paulo a week before the high court decision, 67% of respondents supported the right to terminate an anencephalic pregnancy.

4. The only woman on the high court, Judge Ellen Gracie, voted with the majority in striking down the injunction, but noted that she did so on a legal technicality and was not issuing an opinion on the underlying issue. If the merits of the case come before the court, she is seen as likely to support establishing anencephaly as a third exception to the abortion ban. Judge Gracie has noted that the abortion ban --like most of Brazil's criminal law-- was codified by the 1940 Penal Code, whereas the Constitution was written much later, in 1988, after the end of the military dictatorship. Thus, there remain issues on which the law and the constitution need to be harmonized. In addition to Gracie, three other judges (including Chief Justice Nelson Jobim) who voted to strike down the injunction are seen as possibles to vote in favor of a third exception to the abortion ban. If they all change their vote, the anencephaly exception would be legalized by an 8-3 majority. However, the high court may also refuse to hear arguments on the merits, thus leaving the current ban in place and leaving further action to Congress. The Court's decision on whether to hear the case is expected before year's end.

5. There are currently 24 abortion-related bills in various stages of inactivity in the Chamber of Deputies (lower house), but only two deal with cases of fetus inviability or malformation. One of these was drafted in 1996 by the current Mayor of Sao Paulo, Marta Suplicy. None of the bills have any particular momentum at this time. Another bill, in the Senate, which would have narrowly legalized abortion only

in cases of anencephaly was recently withdrawn by its author, Senator Duciomar Costa (PTB-PA), under pressure from the Catholic Church.

COMMENT - LAWS THAT "DON'T TAKE HOLD"

16. Since 1989, judges have authorized abortions in hundreds of anencephaly cases (on a case-by-case basis) and at least ten more were conducted in the wake of the July 1 injunction. Brazil's books are full of laws that "don't take hold" ("nao pega"), and the abortion ban is one. Studies in the late 1990s showed that as many as 31% of Brazilian pregnancies end in abortion and that the majority of abortion patients are married women who can afford private health plans. Poorer women, more likely to have anencephalic fetuses, are also more likely to utilize public health care where the ban on abortions is more strictly observed. Thus, whether or not the practice violates the letter of the law, abortions are likely to continue to be accessible to many Brazilian women. DANILOVICH